FILED
OCT 2 1925

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 184.

ENRIQUE DEL POZO Y MARCOS, ET AL., *Appellants*,

vs.

WILSON CYPRESS COMPANY, *Appellee*.

REPLY BRIEF OF APPELLANTS ON APPELLEE'S MOTIONS TO DISMISS THE APPEAL.

JOSEPH H. JONES,
JOHN C. JONES,
WILLIAM WHITWELL DEWHURST,
Solicitors and Counsel for Appellants.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

SUBJECT INDEX.

	Page
The clerk's files establish appellants have sought to comply with the rule for printing	1
Its peculiar circumstances will induce the Court to make an exception in this case	2
Federal statutes controlled the general law and State statutes applied by the Circuit Court of Appeals	3
Certain assignments of error to the Circuit Court of Appeals quoted	4-6
That Court failed to consider the Act of February 8, 1827	6-8
Acts of Congress in practically identical words have been construed by the highest court of Alabama and of Louisiana	8
A league square as used in the Act of May 3, 1828, is less than 5000 acres. This fact required the application of that act	10
The Circuit Court of Appeals was required to apply at least three federal statutes, not noticed in this Court's opinion on the former appeal	7-11

INDEX TO CASES CITED.

Clark v. Braden, 10 How. 640	9
Sanchez v. Deering, 288 Federal 415	2
United States v. Young, 8 Peters 484	10
Public Land Laws	8-9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 184.

ENRIQUE DEL POZO Y MARCOS, ET AL., *Appellants*,

vs.

WILSON CYPRESS COMPANY, *Appellee*.

REPLY BRIEF OF APPELLANTS ON APPELLEE'S MOTIONS TO DISMISS THE APPEAL.

Before receipt of briefs of counsel for appellee the briefs of appellants' counsel were in print, so that avoiding so far as possible any argument on the merits, a reply brief seems necessary.

To the motion to dismiss the appeal for failure to print the record a sufficient answer is found in the files of the Clerk's office. From the files it will be established that appellants' counsel within the time prescribed offered to deposit the cost of printing the transcript since the mandate of this Court on the former appeal, and requested the clerk to print this entire transcript.

The affidavits attached to appellants' motion that the Court hear the cause upon the six copies of the printed

transcript used on the former appeal shows that appellants have made every effort to comply with the Court's order made October 13, 1924.

Appellants are not responsible for the more than five years delay in getting the District Court to make a decree after the case was remanded, nor for the destruction of the twenty or more copies of the printed record filed on the former appeal.

We are strongly persuaded that the destruction of the printed records was due to the delay of the District Court to promptly render a decree, and that such delay was due to the fact that the learned District Judge realized that this Court had fallen into error, in its decree herein. As a District Judge he could not overrule this Court; as a learned and courageous judge he would not make a decree he knew would be contrary to the applicable law of the case, settled by repeated decisions of this Court in the Florida cases.

We are supported in this belief by the fact that within a few weeks after the District Judge turned this case over to Judge Bryan to decide he made a decree directly contrary to this Court's opinion in the case at bar.

See Sanchez v. Deering, 288 Federal text 415.

The same character of title, and the same confirmatory statutes were under consideration in the Sanchez case as in the Marcos case. In the Sanchez case the learned District Judge rightly held "that it is from the issuance of the patent that the title became perfect in this case, although the survey was made and approved in 1847."

As stated in our brief in support of Appellants' motion that the Court hear this case upon six copies of the printed transcript filed on the former appeal we feel that under the very peculiar circumstances under which this case stands appellee's motion to dismiss the appeal should be denied and appellants' motion should be granted.

REPLY TO COUNSEL'S BRIEF ON APPELLEE'S MOTION TO DISMISS THE APPEAL FOR WANT OF JURISDICTION OR TO AFFIRM THE DECREE OF THE CIRCUIT COURT OF APPEALS.

The contention of counsel for appellee is that this Court on the former appeal determined and settled all the federal questions in the case; that there were no federal questions before the Circuit Court of Appeals, and none decided by it, therefore no federal questions are brought to this Court under the appeal in this case; that the case when it was heard by the trial court did not involve a construction of the laws of the United States.

The first proposition of this sylogism is disproved by the record, and the last proposition is not sound.

The power to hear and determine, jurisdiction, by statute depends upon the existence of federal questions in the case made by the pleadings.

If it be that the Circuit Court of Appeals, by accident or design, did not decide any federal question, that did not make its decree final—if federal questions were properly before it for review. "In any case in which the judgment or decree of the Circuit Courts of Appeals is not made final *by the provisions of this title*, there shall be of right an appeal or writ of error to the Supreme Court," etc.

Section 241 Judicial Code.

The statute not the judges on the Bench confers or denies jurisdiction.

Printed copies of the transcript upon which the case was heard in the Circuit Court of Appeals are on file in this Court. From that printed record it will be seen that appellants sought a review of the District Court's decree upon questions of general law and State statutes as *controlled by Federal statutes.*

The 7th assignment of error is, "The Court erred in not finding and determining that until the decision made in the

Marcos claim, February 12, 1894, by the Secretary of the Interior a league square as used in the Act of Congress, approved May 23, 1828, was 4438.68 acres or less than 5000 acres."

The 8th assignment: "The Court erred in not finding and determining that until the decision of the Secretary of the Interior (February 12, 1894) the Marcos claim was an unconfirmed claim; that any survey of said unconfirmed claim in 1851 was not authorized by law, and not a segregation of the lands described in the patent until such survey was approved by the Commissioner of the General Land Office."

The 14th assignment: "The Court erred in not finding and determining as alleged in the bill of complaint that from May 26, 1831, to date of issuing the patent, June 26, 1895, the United States (and the State of Florida) had both the legal title and possession and right of possession of the lands described in the patent to the complaniants, and any occupancy of them by Powell-Sanford and Florida colonization company was a mere trespass."

The assignment numbered 14-e: "The Court erred in not finding and determining that the acts of possession, which the Court hold established an adverse possession prior to 1904 were acts done and had while the legal title was in the United States, and the State of Florida—and while the lands patented were claimed by the United States and the State of Florida."

The 15th assignment: "The Court erred in not finding and determining that as alleged on the bill, from May 26, 1831, to June 26, 1895, complainants were precluded from bringing any action for recovery of possession of the lands described in the patent, because during the whole of said period of time said lands were claimed adversely by the United States and held to be public lands of the United States, and school and swamp lands of the State of Florida."

The 17th assignment: "The Court erred in not finding and determining that the burden was on the defendant to estab-

lish that the plat of the Williams survey in 1851 was returned to the Register of the local land office by the Surveyor of public lands in Florida, and that the Surveyor General delivered to complainants ancestor a certificate of said survey, and in the absence of the filing with the register of the local land office of said plat of the Williams survey, the Norris survey in 1845 of the lands patented, as public lands was controlling on the complainants and their ancestor as to where the title to said patented lands rested, prior to the decision of the Secretary of the Interior, February 12, 1894, that the Marcos claim was a confirmed claim."

The 30th assignment: "The Court erred in holding complainants in laches in regard to the land involved, in face of the statute prohibiting and precluding claimants from taking possession, attempting to take possession or survey the property 'until authorized by law,' under penalty of forfeiture of all right, title and claim, and which in effect extended to any action for recovery of same, until allowance of the grant by the proper department of the United States," etc.

The 16th assignment: "The Court erred in not finding and determining that the special provisions of the Act of Congress approved February 8, 1827, applied to the survey of the lands patented to complainants, and that the general statutes relating to public surveys did not control."

The 19th assignment: "The Court erred in being controlled by the dictum found in the opinion rendered by the Supreme Court, that confirmation by Congress of the inchoate floating concession made by Spain to Marcos to the extent of a league square, 'left nothing to be done, but to segregate the land by a survey,' and in not finding and deciding that when the grant was confirmed to the extent of a league square the confirmee was required before May 26, 1831, to relinquish to the United States all of the 5500 acres in excess of what was a league square, as used in the act of Congress of May 23, 1828, according to the then

holding of the Land Department and the Supreme Court."

The 20th assignment: "The Court erred in being controlled by the dictum found in the opinion rendered by the Supreme Court that 'The United States has done no more than recognize the title derived from Spain, and as derived from Spain,' and in not finding that the United States limited its confirmation of the 5500 acres granted to Marcos to confirmation to a tract of 4438.68 acres to be selected out of the granted lands by the confirmee before May 26, 1831, and that until February 12, 1894, complainants and their ancestor were not authorized to take possession of any particular lands, until the 4438.68 acres had been lawfully segregated from the grant made by Spain, if the same could be located."

Pages 1134-1142 printed transcript, filed herein, Case 4053, United States Circuit Court of Appeals, Fifth Circuit.

Enrique Del Pozo y Marcos, *et al*, vs. Wilson Cypress Company.

CONSTRUCTION AND APPLICATION OF FEDERAL STATUTES REQUIRED.

Although these federal questions were pressed upon the attention of the Circuit Judge who tried the case, and upon the Circuit Courts of Appeals, both courts refused to give them any consideration whatever.

Surely a deliberate disregard by the Court of Appeals to consider the Federal questions made in the pleadings is reviewable by this Court.

It may be true that both the District Court and the Circuit Court of Appeals decided this case upon questions of general and local law, but it is equally true that complainant's case as made by their bill, and argument required a consideration and construction of federal statutes, set out in the bill and urged in brief and argument before both courts.

It can not successfully be contended in this Court that the appeal of right given by the act of Congress can be de-

feated by deliberate refusal or failure of either the trial court or the Circuit Court of Appeals, or by both courts, to consider and determine the contentions of litigants based on federal statutes.

Counsels' brief, page 22, says: "The court below treated these questions as already determined and practically formed no part of the record for further determination or decision."

It is because both courts below so treated the federal questions that we are here by appeal as of right.

If the Circuit Court of Appeals may arbitrarily refuse to consider and determine the federal questions made by the pleadings of litigants, it will be unnecessary to enact further statutes, to clear this Court's docket. Appellants' contention is in fact the contention that a majority of the judges of that Court may nullify the Act of Congress under which this appeal was taken.

The Circuit Court of Appeals was asked to determine appellants' case under a patent from the United States, which recites that it was issued under the act of February 8, 1827, and under the act of May 23, 1828.

The act of February 27, 1827, is not mentioned in the former opinion of this Court, although this act and the Missouri Act of May 26, 1824, expressly extended to the Territory of Florida, were and remain controlling of the issues made by the pleadings.

Manifestly this Court's opinion did not withdraw from the consideration of the trial court and from the Court of Appeals federal statutes not mentioned in its opinion.

In its opinion this Court said: "Appellants contend that the survey of 1851 was of no effect unless and until approved by the Commissioner of the General Land Office. This contention has no support in any statute or regulation that was in force at the time. The confirmatory act of 1828 and the act of June 23, 1848, are both silent on the

subject, and *in the absence of some applicable special provision* the general statutes relating to public surveys shall control."

The court overlooked the special statute which existed and controlled—the act of February 8, 1827, an act which vested in the Surveyor General of the Territory of Florida judicial powers.

See letter of Commissioner of General Land Office to the Surveyor General of Florida, dated February 26, 1827, found on page 863 of Volume 2, Public Land Laws, 1838 edition.

Extracts from this letter are printed in our brief filed herein, page —. Also on p. 18 appellant's brief Sanchez v Doering Co.

See also letter from the Commissioner to the Register and Receiver of Florida, dated June 6, 1828, printed on page 734 of said Public Land Laws.

Right and justice required the Circuit Court of Appeals to consider and apply this controlling statute. Acts of Congress in identical terms had been construed in the highest Court of Alabama and Louisiana. The cases are in the briefs submitted by appellants in the Circuit Court of Appeals, and will be submitted to this Court on its hearing on the merits.

Counsel in their brief say: "We submit, therefore, that there were no federal questions in the case before the United States Circuit Court of Appeals, and none decided by it," etc., page 19.

"An appeal has now been taken to this Court from the decision of the United States Circuit Court of Appeals to review the decision of that court on questions arising purely upon the evidence and upon local law," page 23.

ONE STATEMENT OF FACT SUFFICIENTLY DISPROVES COUNSEL'S CONTENTION.

Anticipating the defense of adverse possession and laches appellants' bill alleged that by the express terms of the act of March 1, 1807, extended to the Territory of Florida, they were prohibited from taking possession of the lands described in the patent under penalty of forfeiture of their title or claim thereto.

See Laws of the United States Respecting Public Lands.

In its opinion this Court recites this allegation of the bill, but failed to apply it, or to make any determination of whether or not this statute excluded appellants' ancestor from the lands determined by Robert Butler, Surveyor General, to be public lands of the United States.

DEFENDANTS IN THEIR ANSWER DENIED THIS ALLEGATION OF THE BILL.

The trial court wholly failed to consider the issue made by the bill and answer and supports its finding that complainants are guilty of gross laches by a statement that for more than 50 years appellants had failed to pay taxes on the land, etc.

This action of the trial court was assigned as error on the appeal to the Circuit Court of Appeals and that Court's attention was specially directed to the charge given the jury by Judge Bronson in the case of Clarke v. Braden, 10 How. text page 640.

See his 5th instruction to the jury in the trial of that case.

The failure of the Circuit Court of Appeals to consider and apply this statute is assigned for error in the pending appeal.

One further statement of fact equally meets and overwhelms Counsels' contentions. Upon the former appeal

there was directly presented for determination of this Court what was a league square. Appellants alleged in their bill a league square as used in the act of May 23, 1828, was 4438.68 acres, and that said act required appellants' ancestor to release all the 5500 acres granted to Marcos in excess of 4438.68 acres to obtain the benefit of said act of Congress.

Appellee in its answer averred the grant was confirmed to its full extent by said act of Congress.

It was a controlling issue before the District Court and the Court of Appeals. As this Court wholly failed to consider and determine this issue it was open to both courts and the duty of each of said courts to consider and determine this issue.

The failure of the District Court so to do was assigned for error on appeal to the Court of Appeals. The failure of the Circuit Court of Appeals to do so is here assigned for error.

It appears on the face of this Court's opinion upon the former appeal that it wrongly assumed it was dealing with a confirmed grant and that the Surveyor General of Florida was authorized by law to survey the grant for 5500 acres as a confirmed grant.

That this Court fell into error is conclusively established by consideration of the case of United States vs. Young, 8 Peters 484.

That case came to this Court from the old Superior Court of East Florida under the provisions of the act of May 23, 1828, and the Missouri Act of May 26, 1824, expressly extended to the Territory of Florida.

The jurisdiction of the old Superior Court was limited to cases exceeding a league square—the jurisdiction of this Court on appeal was similarly limited.

The claim of Young which he applied to the old Superior Court to confirm was for 5000 acres. That Court took jurisdiction of the case. The United States answered his peti-

tion and contested the cause on its merits. The trial court confirmed the claim and the United States attorney took an appeal to this Court, which heard the case on its merits and itself confirmed the claim.

A league square is therefore less than 5000 acres.

It therefore appears on the face of the record that without reference to any question as to the character of the grant to Marcos under the laws in force before the cession of the Floridas—which this Court in its opinion says "is the first proposition on the merits" (text 644), or of the Treaty of 1818, both of which were before this Court and unnoticed in its opinion, and were also unnoticed by the trial court and the Circuit Court of Appeals, though in brief and argument pressed upon their attention, at least three federal statutes were before the last two courts for consideration and application—that the determination of either one of these federal statutes as determined by the appellate courts would have destroyed the whole theory on which the several opinions in this case rest; and that the Circuit Court of Appeals in its opinion omitted to consider and apply either of said federal statutes and that this failure has been assigned as error on appeal to this Court.

We respectfully submit the motion to dismiss this appeal for want of jurisdiction should be denied.

JOSEPH H. JONES,
JOHN C. JONES,
WILLIAM WHITWELL DEWHURST,
Solicitors and Counsel for Appellants.